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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. ~~750~~ 47

SYSTEM FEDERATION No. 91, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO, ET AL., - - - - - - - - - Petitioners,

versus

O. V. WRIGHT, ET AL., - - - - Respondents.

BRIEF OF RESPONDENT LOUISVILLE AND NASHVILLE RAILROAD COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYES' DEPARTMENT, AFL–CIO, ET AL., - - - - - - - - *Petitioners,*

v.

O. V. WRIGHT, ET AL., - - - *Respondents.*

BRIEF OF RESPONDENT LOUISVILLE AND NASHVILLE RAILROAD COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

I. THE OPINIONS OF THE UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The Opinion of the United States District Court for the Western District of Kentucky, Chief Judge Roy M. Shelbourne, is reported in 165 F. Supp. 443. The Per Curiam Opinion by Circuit Judges McAllister, Martin and Cecil of the United States Court of Appeals for the Sixth Circuit is reported in 272 F. 2d 56.

II. JURISDICTION OF THE COURT.

Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Sixth Circuit entered December 5, 1959, by means of a writ of certiorari is contained in 28 U.S.C. Sec. 1254 (1).

III. STATUTES INVOLVED.

45 U.S.C. Sec. 152, Third, Fourth, Fifth, Eighth, Ninth and Eleventh (44 Stat. 577, 48 Stat. 1186, 62 Stat. 909, 64 Stat. 1238), being parts of the Railway Labor Act. Subsection Eleventh is quoted verbatim on pages 2-4 of the Petition for a Writ of Certiorari of System Federation No. 91. Subsections Third, Fourth, Fifth, Eighth and Ninth are set forth in the Appendix hereof.

IV. COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

A. Did the District Court abuse its discretion in refusing to modify an injunction protecting employees against discrimination by the Railroad and the Unions because of non-union membership, when the Unions, the moving party, failed to make, as required by *United States* v. *Swift & Company*, 286 U. S. 106, a clear showing of extreme hardship such as to justify a finding that the Unions were victims of oppression or grievous wrong?

B. Were the District Court and the Circuit Court of Appeals correct in following the rule concerning the showing required of the moving party as set forth by this Court in *United States* v. *Swift & Company*, 286 U. S. 106?

C. Since there was no change in the factual situation justifying a modification of the injunction, does the mere change of the law made by the 1951 Amendment to the Railway Labor Act (45 U.S.C. Sec. 152, Eleventh) justify the sought modification, particularly where, as here, the injunction was based upon an agreement of the parties that the prohibition of the union shop was to have prospective application?

D. Was the motion to modify the injunction, on the sole ground of change of law, properly denied where the uncontradicted proof establishes that the moving party has unclean hands?

V. COUNTER-STATEMENT OF THE FACTS.

In order to give the Court the proper background in this case, it will be necessary to state the facts concerning this litigation from its inception in 1945.

On July 16, 1945, the plaintiffs, employees (16a-17a)* located at various points on the Louisville and Nashville Railroad, brought an action against System Federation No. 91, Railway Employes' Department,

*Numerals followed by letter "a" refer to Petitioners' Appendix filed in the Court of Appeals. Numerals followed by letter "b" refer to pages of Appendix of the Respondents (other than the Railroad) filed in the Court of Appeals.

American Federation of Labor, a group of affiliated international and local labor organizations, various officers of the local labor organizations and the Louisville and Nashville Railroad Company.

The complaint alleged (23a-36a) that the defendants had consistently violated the purpose, terms and provisions of the Railway Labor Act by hostile discrimination against the members of the different crafts who were not members of the Unions and their locals, for the purpose of giving preference to members of the different crafts who were members of the Unions. It was alleged that said defendants followed towards the members of the crafts who were not members of the Unions a policy calculated to limit the freedom of association among said employees and to force them into joining the Unions, putting into effect a virtual "closed shop". It was alleged, further (25a-26a), that the Unions and the Railroad had violated the Railway Labor Act in denying to the employees who did not belong to the Unions:

(1) The right to bid on vacancies;

(2) The right to promotion to higher jobs or preferred jobs; and

(3) The right to work overtime at punitive rates of pay.

The plaintiffs alleged (26a-32a) that they were damaged in the sum of $5,000.00 each and had suffered irreparable injury, and would continue to suffer further irreparable injury unless the Court granted

the relief requested. Summarily stated, the plaintiffs prayed for:

(1) A declaratory judgment, binding on all of the parties, settling and declaring the rights, interests and legal relations of the respective parties (37a-38a);

(2) An injunction to protect and enforce such rights and obligations as might be declared (38a-39a); and

(3) Judgment awarding each of the plaintiffs $5,000.00 (40a).

After the taking of depositions, a consent judgment, decree and injunction were entered by the District Court (41a). In addition, releases were secured by the defendants from the plaintiffs, upon the payment to the plaintiffs collectively of the total sum of $5,000.00 (71b), $2,500.00 having been paid by the Railroad and $2,500.00 by the Unions, and the agreement of the parties that formed the basis of the injunction.

The consent decree, entered December 7, 1945, was entered with the consent and by agreement of all the parties. It ordered, adjudged and decreed as follows:

(1) That the Unions are under the obligation and duty to represent and treat fairly and impartially, and without discrimination based on membership or non-membership in any labor organization, all members of the crafts or classes, including plaintiffs, without regard to whether

said employees are members or retain their membership in the Unions (41a);

(2) That the Railroad is under the obligation and duty to refrain from discrimination against its employees in the crafts or classes, including the plaintiffs, because of the failure or refusal of said employees to join or retain their membership in any of the Unions (42a);

(3) That the plaintiffs and all other employees of the Railroad in the crafts or classes involved who are not members of the Unions shall, in accordance with the collective bargaining agreements, be entitled, irrespective of and without regard to whether they join or retain membership in the Unions, to the rights of promotion, the proper protection of seniority, the right to bid on and be assigned to vacancies, the right to leaves of absence with proper protection of seniority, and the right to a proper share of overtime work, as provided for in such agreements then in effect or that may thereafter be in effect in accordance with the Railway Labor Act (42a-43a);

(4) That all of the defendants be enjoined from requiring the plaintiffs, and the classes represented by them, to join or retain their membership in the Unions as a condition to receiving promotion, leaves of absence, proper protection of seniority, overtime work and other rights or benefits which may arise out of or be in accordance with regularly adopted bargaining agreements

then in effect or that might thereafter be in effect (43a); and

(5) That the defendants be further enjoined, in the application of the provisions of the regularly adopted bargaining agreements then in effect or that might thereafter be in effect, from discriminating against the plaintiffs and the classes represented by them by reason of, or on account of, the refusal of said employees to join or retain their membership in any of the Unions (44a).

The judgment, decree and injunction have remained in full force and effect, and twice the Railroad and the Unions have been called upon to defend contempt citations. *System Federation No. 91* v. *Reed, et al.*, 180 F. 2d 991 (C. A. 6th); *John R. Cain* v. *System Federation No. 91, et al.*, February 27, 1946, Western District of Kentucky, Civil Action 942 (Not Reported).

A motion to modify the injunction (45a) was filed July 2, 1957, by System Federation No. 91, Railway Employes' Department, A.F.L.–C.I.O. (formerly known as System Federation No. 91, Railway Employes' Department, American Federation of Labor), and other Union defendants or their successors.

The Unions moving to modify stated (45a) that they and other labor organizations representing different crafts of the Railroad's employees were currently seeking to negotiate, with respect to the employees of the Railroad represented by them under the Railway Labor Act, agreements requiring the em-

ployees so represented, as a condition of their continued employment, to become and remain members of the organizations representing their respective crafts, subject to the limitations and conditions prescribed in Section 2, Eleventh, of said Act as amended (49a).

The Unions further alleged (46a) that at the time of the institution of this action, and at the time of the entry of the decree of the injunction, Section 2, Fourth and Fifth, of the Railway Labor Act (45 U.S.C. Sec. 152, Fourth and Fifth) made it unlawful for carriers to interfere in any way with the organization of their employees or to coerce or compel their employees to join or remain, or not to join or remain, members of any labor organization. Such prohibitions were generally construed as creating the "open shop" in the railroad industry, and making unlawful the closed shop or union shop, as well as other forms of union security agreements (46a).

In paragraph 5 of the motion (49a) it was alleged that the 1951 Amendment (45 U.S.C. Sec. 152, Eleventh) to the Railway Labor Act terminated, to the extent specified therein, the employees' right to be free from the requirements of union security agreements and that it is no longer equitable that said decree of injunction should have prospective application to prohibit the defendants from negotiating such agreements pursuant to express Congressional authorization.

The Unions' motion to modify the injunction was based solely on the change of law. They introduced

no evidence on the question whether or not there had been a change in the factual situation which had existed at the time of the entry of the consent decree and injunction. The employee respondents introduced evidence showing that even at the time of the proceeding to modify, abuse and threats of discrimination continued to be directed against employees not in complete accord with union activities and policies (1b-69b). The abuse and threats were intensified following a strike in 1955. After this strike it was necessary for the Railroad Company to provide police protection for such employees and, even at the time of the proceeding to modify the injunction, such police protection was still necessary at some points (59b). The record in this case shows that if the Unions are released from the restraint of this injunction, they or their members will make every effort to deprive the non-union men of their jobs. The oral evidence shows that personal hatred and violence had been practiced, and are being practiced, against non-union workers. This injunction alone has preserved their jobs (60b).

In this proceeding to modify the injunction, the District Court concluded (165 F. Supp. 443, 447, 448) from the history of the 1951 Amendment of the Railway Labor Act, as reflected by the proceedings in Committees of Congress and as determined by this Court in the case of *Railway Employes' Department, et al.* v. *Hanson,* 351 U. S. 225, that the union shop provisions of the Railway Labor Act are permissive, and that Congress has not compelled or required carriers and employees to enter into union shop agree-

ments. The District Court therefore concluded (page 448) that the 1951 Amendment to the Act leaves the Railroad and the bargaining Unions at liberty to agree that a union shop shall not prevail. This reasoning, applied to the agreement which underlay the injunction and declaration of rights of December 7, 1945, when the Railway Labor Act forbade a union shop, forced the Court to the conclusion that the unions had not been compelled to agree (as they did freely agree at the time of the consent decree) that membership in a Union would not be required of the plaintiffs as a condition of employment in any collective bargaining agreement then in effect between the Railroad and the Unions, or in such agreements as might thereafter be in effect between the Railroad and the Unions in accordance with the Railway Labor Act.

The Court noted, at page 448, that a reading of the agreed judgment will show that it refers not only to any collective bargaining agreement then in effect but to such future agreements as might thereafter be made between the Railroad and the bargaining Unions; that in 1945 there was no provision in the Railway Labor Act prohibiting the Railroad and the Unions from agreeing that a union shop should not obtain; and that there is no prohibition now in the Railway Labor Act prohibiting the Railroad and the bargaining Unions from agreeing that a union shop shall not prevail. Therefore, under the *Hanson* case, *supra,* the Court reasoned, if the union shop agreement is permissive, it is also permissive to agree that a union shop shall not prevail.

The District Court, 165 F. Supp. 443, 448, concluded that it has continuing authority to modify the injunction, under the doctrine of *United States* v. *Swift & Company,* 286 U. S. 106, but that the change in the Railway Labor Act in 1951 deleting the prohibition against a union shop and making it permissive does not compel a modification of the decree which enjoined the Railroad and the Unions from providing for a union shop in existing agreements or those to be thereafter made. The Court concluded that the standard set up in the *Swift* case for modification of an injunction had not been met, in that there was no clear showing of grievous wrong evoked by new and unforeseen conditions which should lead the Court to change what had been decreed, after years of litigation, with the consent of all concerned.

The District Court did not consider the existence or non-existence of animosity, hostility, or bitterness as decisive of the question (165 F. Supp. 443, 449), but expressed an unwillingness, *in view of the circumstances proven,* to supervise the affairs of the Unions to prevent the Unions from discriminating against the present non-union employees if they were taken into the Unions.

The District Court stated that the provisions of the Railway Labor Act (45 U.S.C. Sec. 152, Fourth and Fifth) made illegal a union shop in 1945 when the injunction was agreed upon. Hence, it was then unnecessary for the Railroad and the Unions to agree, as they did, that the non-union members should not be required to join or retain membership in any union.

The Court pointed out that the Railroad and Unions went further and agreed (between themselves and with the employees of the Railroad) that no such union membership should thereafter be required in any bargaining agreement.

The District Court held that the 1951 Amendment did no more than make negotiations for a union shop permissive, as was recognized in the *Hanson* case, *supra.* It stated that the Amendment did not nullify the agreement or the injunction in question, and that it did not prohibit an agreement between the Railroad and the Unions that a union shop should not exist. The Court concluded to leave the parties as they agreed to be and to remain, and, accordingly, it overruled the motion to modify.

Upon appeal to the United States Court of Appeals for the Sixth Circuit (272 F. 2d 56), that Court dealt realistically with the problem, which previously had been before it. It noted that this controversy had its beginning in bitter disagreements between groups of union and non-union employees arising many years ago and that "it also stems from a strike, accompanied by much violence, in 1955, in which a railroad bridge was burned, and certain employees were sentenced to prison terms, for violation of, and conspiracy to violate, the Federal Train Wreck Act," 18 U.S.C. Sec. 1992. It cited *Stanley* v *United States,* 245 F. 2d 427 (C. A. 6th), the case involving those convictions. After reciting the facts of the case at bar, the Court of Appeals affirmed the ruling of the District Court that when the injunction was issued the parties therein, by

their consent thereto, provided that no requirement of union membership should thereafter be in effect in any bargaining agreement. It agreed that the 1951 Amendment did no more than make negotiations for a union shop permissive, and did not nullify the agreement or the injunction issued. It found no error in the order of the District Court which, *under the circumstances of the case,* left the parties as they agreed to be.

VI. REASONS FOR DENYING THE WRIT.

A. The Petition for a Writ of Certiorari Should Be Denied Because the District Court and the Circuit Court of Appeals Followed the Law as Set Forth by This Court in *United States* v. *Swift & Company*, 286 U. S. 106, and *Ford Motor Company* v. *United States*, 335 U. S. 303.

This case is governed by the decisions in *United States* v. *Swift & Company,* 286 U. S. 106, and *Ford Motor Company* v. *United States,* 335 U. S. 303. Both of the lower Courts have followed those decisions, as is plainly to be seen from their respective opinions. Under Rule 19 of this Court's Rules, the petition for a writ of certiorari should therefore be denied.

In determining whether this case should be reviewed, the evidence introduced by the non-union workers may well be analyzed. Their uncontradicted evidence conclusively shows that one of the purposes of the Unions or the members thereof in seeking a

union shop agreement is to force the non-union man out of his job (14b). As stated by one witness (14b):

> "Yes, sir, up in my locker room, since this letter has been out, they would never tell you anything, but they always talking where you could hear it, as soon as this injunction is mortified (sic), we will get all the scabs, we will get all the scabs. They said that on the 2nd of January, I heard a gang of them saying the same thing, on the 2nd of January, said, as soon as this injunction is dissolved, we are going to get all the scabs."

It is clear that the discrimination forbidden by the injunction is still being practiced by union members, including discrimination against those who testified in this case (79b). This is the plain import of the letter of Mr. Jake Paschall, General Chairman, Brotherhood of Railway Firemen and Enginemen, to certain Alabama lodges dated February 6, 1958, concerning the witnesses who testified at the trial (79b-80b).

As was pointed out by the District Court (17a), the Unions made no attempt to rebut the testimony given as to the bitterness and hostility that exist between the employees who are union members and the non-union employees, and also between the Unions and their members who worked during the 1955 strike.

The doctrine of *United States* v. *Swift & Company*, 286 U. S. 106, followed by the lower Courts, may be gathered from the following quotations therefrom:

> ". . . The question is not whether a modification as to groceries can be made without

prejudice to the interests of producers of cattle on the hoof. The question is whether it can be made without prejudice to the interests of the classes whom this particular restraint was intended to protect . . ." (Pages 117-118)

". . . The opportunity will be theirs to renew the war of extermination that they waged in years gone by." (Page 118)

". . . The difficulty of ferreting out these evils and repressing them when discovered supplies *an additional reason why we should leave the defendants where we find them, especially since the place where we find them is the one where they agreed to be.*" (Page 119) (Emphasis added.)

". . . No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." (Page 119)

". . . Wisely or unwisely, they submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall." (Page 119)

"What was then solemnly adjudged as a final composition of an historic litigation will not lightly be undone at the suit of the offenders, and the composition held for nothing." (Page 120)

To the same effect is *Ford Motor Company* v. *United States,* 335 U. S. 303.

Under the authorities cited it is clear that the burden of proof was on the Petitioners to show that inequity and grievous wrong would result from continuing the injunction in force. No change in the factual situation having been shown—indeed, it having been shown that present conditions are, if anything, worse than those which obtained at the time the injunction was agreed upon—there was no justification for any modification of the injunction. Please compare the *Ford Motor* case, where this Court stated (page 322): "The Government [movant] has not sustained the burden of showing good cause why a court of equity should grant relief from an undertaking well understood and carefully formulated."

In the Petition it is contended that the effect of the denial of the requested modification is to maintain an everlasting prohibition against a union-shop agreement and to perpetuate a restraint against conduct now lawful (page 9). Such a contention discloses a misunderstanding by the Petitioners of the decisions below, and is tantamount to an admission by the Unions that they will perpetually practice abuse and discrimination. The decisions of the Courts below are simply to the effect that upon the present record a modification of the injunction should not be granted. The Unions did not introduce any evidence, and the reason they did not do so must have been that they well knew that animosity and bad faith towards the non-union workers still exist.

In the consent decree, the parties, at a time when the Unions were urging a change of the law, agreed (43a-44a): ". . . and they [the Railroad Company and the Unions] are further enjoined, in the application of the provisions of the regularly adopted bargaining agreements in effect between the defendant Railroad and the defendant Unions, or that may be hereafter in effect between the defendant Railroad and the defendant Unions in accordance with the provisions of the Railway Labor Act, from discriminating against the plaintiffs and the classes represented by them in this action by reason of or on account of the refusal of said employees to join or retain their membership in any of defendant labor organizations, or any labor organization." The District Court could only hold that the parties, in agreeing to the consent decree, had in mind future contracts and that they negotiated in such a manner that the consent decree would be effective as to such future contracts. If it had been desired that a change of law should make the decree inapplicable, provision therefor would have been included. No such provision was included. On the contrary, the wording of the agreed decree manifested the clear intent of the parties that the non-union membership provision was to have prospective effect. In the light of this history, the Court exercised sound discretion when it declined the relief requested by the Unions.

The decision as to whether or not equitable grounds for relief are established is a matter within the sound discretion of the trial Court, and the determination

by it should not be disturbed on appeal except for abuse of discretion. *Perrin* v. *Aluminum Company of America,* 197 F. 2d 254, 255 (C. A. 9th); *Morse-Starrett Products Company* v. *Steccone,* 205 F. 2d 244, 248-249 (C. A. 9th); *Western Union Telegraph Company* v. *Dismang,* 106 F. 2d 362, 364 (C. A. 10th). If the facts do not meet the requirements of the rule set forth in *United States* v. *Swift & Company, supra,* a motion under Rule 60 (b) (5), Federal Rules of Civil Procedure, should be denied. *Morse-Starrett Products Company* v. *Steccone, supra.* As clearly shown by the Opinions of the District Court and the Court of Appeals, there was no abuse of discretion below in denying the motion to modify and, therefore, the petition for a writ of certiorari should be denied.

This case is similar in general principle to *Steele* v. *Louisville & N. R. Co., et al.,* 323 U. S. 192, wherein this Court held that bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of workers.

Another reason for the consent decree having been worded in the manner it was (to the effect that the union-shop clause would not be a provision in any future contract between the Unions and the Railroad) arose from historical fact of which this Court can take judicial notice. *Dennis* v. *United States,* 339 U. S. 162, 169; *Bowles* v. *United States,* 319 U. S. 33, 35; 20 *Am. Jur.,* Evidence, Section 44, page 67. The non-union men had every reason to fear such a change in the law as was effected by the 1951 Amendment because the

National Labor Relations Act applicable to other industries at that time did permit closed shop contracts (Section 8(a) (3), National Labor Relations Act, 29 U.S.C. Section 158(a) (3)). They therefore sought to protect themselves by means of the agreed decree.

Moreover, it was well known at the time of the entry of the consent decree herein that the railroad Unions had been exerting every effort to amend the Railway Labor Act to provide for a union shop. Presidential Orders, as well as the history and background of the Amendment, make this perfectly apparent. Attention is especially invited to the Transcript of the Proceedings of the National Railway Labor Panel Emergency Board, Chicago, Illinois, 1943, Volume 2. On September 25, 1942, notices were served by the Unions on the railroads, including the Louisville and Nashville Railroad, demanding a union shop (Volume 2, page 2106). The railroads declined the demand on the ground that the existing Act prohibited union shops (45 U. S. C. Sec. 152, Fourth and Fifth). In order to resolve this issue along with demands for wage increases, the President, pursuant to 45 U.S.C. Sec. 160, created an Emergency Board and referred the matter to it. In the briefs filed with the Board, the Unions argued that there was nothing in the Railway Labor Act which prevented the Emergency Board from recommending that the Act itself be amended to provide for a union shop if such a procedure appeared to be the most feasible method of settling a dispute (Volume 2, pages 1979-1980, *supra*). They also urged that the emergency war powers of the President were such that by executive order or other-

wise a union shop could be established in the industry (Volume 2, pages 1972-1976, *supra*). However, the Emergency Board and the President refused to accede to the Unions' demands.

With this background in mind, it is perfectly apparent why the non-union men protected themselves, as they did, in the agreement and consent decree against ever being required to join a Union under a union-shop agreement between the Railroad and the Unions. All parties knew at the time of the agreement and consent decree in 1945 that the Unions were trying to get the law so amended as to make the union shop legal.

The non-union men have every right to ask for the continuance of the decree because such protection was one reason for their placing great emphasis upon such an agreement and order and in placing practically no emphasis on the recovery of damages. The fact that the Unions made a bargain which they now regret is no reason for not enforcing the agreement as set forth in the order. *United States* v. *Swift & Company, supra,* page 119.

B. The Decisions of the Circuit Court of Appeals and the District Court Are Not in Conflict With Applicable Decisions of This Court or the Courts of Appeals of Other Circuits.

Petitioners rely upon *United States* v. *Swift & Company,* 286 U. S. 106, but it does not support their position. In that case, the defendants, like the Petitioners here, moved for modification of an outstanding

injunction but failed to carry the necessary burden. The injunction therefore was not modified.

Other cases cited by Petitioners also fail to support their position.

In *Coca-Cola Company* v. *Standard Bottling Company*, 138 F. 2d 788 (C. A. 10th), a consent decree had been entered against the Standard Bottling Company enjoining it from selling any products having in their names the word "Cola" or "Coca-Cola" or similar words. During the pendency of the injunction, a number of other companies in the territory began selling similar products, such as Pepsi-Cola, Cleo-Cola and Royal Crown Cola. In view of this change in the factual situation, a modification was made in the injunction. In the present case, however, there is no change in the factual situation concerning the discrimination at which the injunction was directed. Moreover, the *Coca-Cola* case did not involve, as this one does, contract rights of the parties or classes affected by the decree. Thus, the case is not applicable here.

Chrysler Corporation v. *United States*, 316 U. S. 556, is no authority for modifying the decree in this case. It simply holds that where a decree is impossible of performance, due to circumstances beyond the control of the parties, the injunction *may* be modified. This is not the situation here. Moreover, the ruling in that case has been limited by the later case of *Ford Motor Company* v. *United States*, 335 U. S. 303, wherein this Court refused to make a "mechanical application" of the *Chrysler* case and stated that the moving party had the burden of showing good cause

why a court of equity should grant relief from a carefully drawn decree ending years of litigation. Thus, the decisions below are not contrary to the law contained in these two cases.

In *State of Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U. S. 421, the basis for the subsequent dissolution of an injunction was merely a declaration by Congress that a bridge in question did not interfere with navigation, a fact which was true at the time the injunction was issued as well as at the time the injunction was dissolved. The injunction was not dissolved because of the change of any statutory law in existence at the time the injunction was entered. The subsequent Act of Congress was more in the nature of a declaration of a fact. Congress in effect said that as far as it was concerned, the injunction should not have issued in the first place.

Western Union Telegraph Company v. *International Brotherhood of Electrical Workers*, 133 F. 2d 955 (C. A. 7th), is not in conflict with the decisions below, for in that case the modification of the injunction was not granted. In the *Western Union* case, it was contended that a change of law justified the modification of the injunction against the labor union. The Norris-LaGuardia Act (29 U.S.C. Sec. 101, *et seq.*) had been passed, and it was contended that the injunction should be set aside. The Seventh Circuit, at page 959, considered the admonition of this Court in the *Swift* case, *supra*, to the effect that "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead the Court to change what

was decreed after years of litigation." The record showed, as this record shows, that the union had not mended its ways, and the case was sent back to the trial Court for inquiry into the good faith of the union and whether it came into Court with "clean hands." In the present case the Unions made no attempt to show "clean hands". Thus, on the authority of the *Western Union* case, since no showing was here made by the Unions except that there had been a change of law, and since a showing was made by the affected employees that the Unions did not have "clean hands", the motion was properly denied. It is undisputed that violence and undiminished discrimination by the Unions or by members of the Unions continue at many points on the Railroad. The *Western Union* case is actually against the Petitioners rather than for them.

The decisions below are not contrary to *Ladner* v. *Siegel,* 298 Pa. 487, 148 A. 699 (which was cited by this Court in the *Swift* case), because the *Ladner* case did not involve the question of a change of law alone but involved also the question of a change in the factual situation between the date of the issuance of the original decree and the motion for modification. The problem in that case involved the location of a garage and whether or not it could be used as a public garage. The surrounding property had, in fact, changed from residential to commercial. The Pennsylvania Court thus set out succinctly the formula for modification of an injunction (148 A. 702):

> "The modification of a decree in a preventive injunction is inherent in the court which granted

> it, and may be made, (a) if, in its discretion judicially exercised, it believes the ends of justice would be served by a modification, *and* (b) where the law, common or statutory, has changed, been modified or extended, *and* (c) *where there is a change in the controlling facts on which the injunction rested.*'" (Emphasis added.)

It is therefore clear under the *Ladner* case, that, in order to justify a modification of an injunction, there must be a change in the factual situation that formed the basis for the injunction. A change of law alone is not sufficient, and the Court in the *Ladner* case did not approve the modification of the injunction upon the ground of statutory change alone.

The injunction issued in the case of *Santa Rita Oil Company* v. *State Board of Equalization,* 112 Mont. 359, 116 P. 2d 1012, 136 A.L.R. 757, was based *solely* upon the law as it had previously been laid down by this Court. After its issuance, this Court reversed its former decisions thereby entirely removing the foundation of the injunction. The injunction in the present case, in contrast, was bottomed upon the discrimination practiced against certain employees, and such discrimination remains unlawful. Also forming the basis of the injunction in the present case is the underlying agreement of the parties prohibiting provisions in any future collective bargaining agreement which would require the employee respondents to join a union.

Analysis of the case of *National Electric Service Corporation* v. *District 50, United Mine Workers,* 279 S. W. 2d 808 (Ky.), will show that, as in the *Santa*

Rita case, the injunction had been rested by the trial Court *solely* on the law as it then existed, and this Court, by a subsequent decision, changed the law. Even in those circumstances, the Court of Appeals of Kentucky held that modification of the injunction was not a matter of absolute right but lay in the discretion of the trial Court.

In *Degenhart* v. *Harford,* 59 Ohio App. 552, 18 N. E. 2d 990, the rule is stated that for an injunction to be modified because of a change of law, the situation must have changed with respect to a *fact* which was the basis of, and material to, the original injunction. Thus, in the *Degenhart* case, the defendant had been restrained from maintaining and operating a funeral home in the residential district upon the ground

(1) that it was a nuisance, and

(2) that it was forbidden by city ordinance.

The Court held that the fact that the city subsequently modified its zoning ordinance so as to permit the maintenance of the funeral home within a residential district, did not justify a modification of the injunction. This ruling was based on the sound ground that the original ordinance was not the basis for the conclusion that the operation constituted a nuisance. By the same token, the injunction in this case was rested on the ground that there was discrimination practiced by the defendants in relation to the non-union employees. A change of law on a secondary proposition permitting a union shop in no way touched the main principle.

Another case directly in point is *Sunbeam Corporation* v. *Charles Appliances,* 119 F. Supp. 492 (S.D., N.Y.). There, the rule is laid down as follows (page 494):

> ". . . The mere change in decisional law upon which a permanent injunction was granted, in and of itself, will not support the opening or modification of the decree. The circumstances and the situation of the parties must so have changed as to make it equitable to do so. This indispensable ingredient is lacking in the case at bar."

The same rule should be applied here, for the moving Unions have practiced the case on a change of law only. This, in and of itself, is not enough. Please see, also, *Morse-Starrett Products Company* v. *Steccone,* 205 F. 2d 244 (C. A. 9th).

As stated in *United States* v. *Radio Corporation of America,* 46 F. Supp. 654, 656 (D., Del.), while a Court may have power to modify injunctions upon a proper showing of a change of circumstances, such modification must be consistent with the purpose of the original injunction and calculated to effectuate and not thwart its basic purpose. *United States* v. *International Harvester Company,* 274 U. S. 693, 702; *Chrysler Corporation* v. *United States,* 316 U. S. 556. A modification of the injunction in accordanee with the Petitioners' motion would thwart the purpose of the original decree. By indirection, it would deprive the non-union men of the very things that were complained about: the right to overtime, the right to bid on new jobs, and the right of employment. The union shop provision sought by

the modification, in practical effect, goes after the basic means of livelihood of the employee. The basic purpose of the original injunction was to protect the man in his job and in seeking other employment on the Railroad, even though he was a non-union man. If the modification had been granted, that protection of the non-union employees would have been gone.

Discrimination by the Union men continues. Non-union men still need the protection of this injunction. As one witness quoted his fellow workers, ". . . as soon as this injunction is 'mortified', we will get all the scabs . . ." (14b). Under these circumstances, this Railroad, pursuant to the agreement made in good faith, can only oppose the modification of this injunction, which modification would deprive many of its employees of their livelihood.

Clearly, the decisions of the District Court and the Court of Appeals are not contrary to the cases cited in the Petitioners' Brief. In the exercise of sound discretion, the District Court and the Court of Appeals could do no other than to deny the motion to modify.

VII. CONCLUSION.

It is respectfully submitted that the law concerning this case was well settled by *United States* v. *Swift & Company*, 286 U. S. 106, and by *Ford Motor Company* v. *United States*, 335 U. S. 303. The decisions below are not in conflict with any decision of this Court or with decisions of other United States Courts of Appeals. For these reasons the Petition for a Writ of

Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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